UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION FOUR

EURO MOTORCARS DEVON, INC.,

Employer **Case No. 04-RC-181300**

and

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, DISTRICT LODGE 15, LOCAL LODGE 447,

Petitioner

BRIEF IN SUPPORT OF EMPLOYER'S EXCEPTIONS TO THE HEARING OFFICER'S REPORT ON OBJECTIONS

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EMPLOYER'S REQUEST FOR REVIEW OF THE REGIONAL DIRECTOR'S DECISION ON OBJECTIONS TO ELECTION AND CERTIFICATION OF REPRESENTATIVE

Pursuant to Section 102.67(c) of the National Labor Relations Board's ("Board" or "NLRB") Rules and Regulations, Euro Motorcars Devon, Inc. (the "Employer" or "Dealership") submits this Request for Review of the Regional Director's January 17, 2017 Decision On Objections To Election And Certification of Representative ("RD Decision") in the above captioned matter, which certified the International Association of Machinist and Aerospace Workers, AFL-CIO, District Lodge 15, Local Lodge 447 (the "Union" or "IAM") as the exclusive collective-bargaining representative of Dealership technicians. Under the Board's Rules and Regulations, we submit this Request to overturn the RD Decision on the grounds that a substantial question of law is raised based on the absence of, or departures from, officially reported Board precedent. This Request must also be granted because the Regional Director's rulings regarding substantial factual issues are clearly erroneous on the record, and such errors prejudicially affected the rights of the Employer.

I. PROCEDURAL HISTORY

A. The Petition And Stipulated Election Agreement.

On or about August 2, 2016,[1] the International Association of Machinists and Aerospace Workers, AFL-CIO, District Lodge 15, Local Lodge 447 (the "Union," the "IAM" or the "Petitioner") filed a Petition for Representation seeking to represent certain Dealership employees. B. Ex. 1.[2] On August 9, the Regional Director approved a Stipulated Election

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1 All dates herein refer to 2016, unless otherwise stated.

2 Throughout Employer's Request, references to Board hearing exhibits are designated "B. Ex. __". References to the official hearing transcript are designated "Tr. __". References to the Hearing Officer's Report On Objections are designated "Rep. __." References to the Regional Director's Decision are designated "RD Dec. __." References to Employer's hearing exhibits are designated "Er. Ex. __".

Agreement ("Agreement") between the Employer and the Union. Id. According to the Agreement, "[a]ll full-time and regular part-time automotive technicians employed by the Employer at its 214 West Lancaster Ave., Devon, PA facility" were eligible to vote in an election to be held on August 26 from 11 a.m. to 1 p.m. Id. Per the Agreement, the "automotive dispatcher[ ]" (hereinafter referred to as the "Dispatcher") would vote subject to challenge based on his unresolved eligibility status. Id.

B. The August 26 Election.

Pursuant to the Agreement, a Board election was conducted on August 26 in the technicians' breakroom of the Employer's Service Building, located at 214 West Lancaster Avenue, Devon, Pennsylvania. The election resulted in: eighteen (18) ballots cast for the Union; eight (8) cast for the Employer; and two (2) challenged ballots, including the Dispatcher's. Id.

C. The Employer's Objections To Conduct Affecting The Results Of The Election.

On September 2, the Employer timely filed Objections To Conduct Affecting The Results Of The Election ("Objections"). The Objections were:

> 1. Following the filing of the petition, and during the critical period, up to and including the day of the election, Petitioner, by and through its limited agent and representative Daniel Loewy, a putative Dispatch supervisor, intentionally targeted and harassed an eligible voter(s) in an attempt to discourage him and others from exercising their rights guaranteed by Section 7 of the National Labor Relations Act. Petitioner, by its conduct, created an atmosphere of fear and intimidation, destroying the laboratory conditions necessary for a free and fair election.
>
> 2. On August 26, 2016, minutes before the polls opened, and in close proximity to the voting area and eligible voters, Petitioner's Director of Organizing, Vincent Addeo, engaged in threatening conduct in an attempt to intimidate the Employer's [Executive] Vice President, Christopher Mackey, and those eligible voters within earshot by shouting homophobic slurs and obscenities at Mackey in a menacing manner. Petitioner, by its conduct in the

> presence of eligible voters and in close proximity to the voting time and location, created an atmosphere of fear and intimidation, destroying the laboratory conditions necessary for a free and fair election.
>
> 3. On August 26, 2016, before the polls opened, Petitioner's limited agent and representative Daniel Loewy, a putative Dispatch supervisor, conducted a group meeting on work time in the Dispatch [O]ffice with approximately four (4) eligible voters. Petitioner, by its conduct, created an atmosphere of fear and intimidation, destroying laboratory conditions necessary for a free and fair election and engaged in actions in violation of the *Peerless Plywood* rule.

Id.[3]

On October 6, the Regional Director issued a Report And Recommendation On Objections To Election, Order Directing Hearing, And Notice Of Hearing On Objections To Election (the "Order").

D. The Hearing And The Hearing Officer's Report.

On October 20, pursuant to the Order, a hearing on the Objections was held before Hearing Officer Jennifer Schulze at the Board's offices in Philadelphia, Pennsylvania. At the hearing, the Union hand-delivered a Petition to Revoke subpoenas *duces tecum* timely served by the Employer on the Union's offices. The Hearing Officer sustained the Petition to Revoke on the grounds that the subpoenas – which demanded only documents – were not accompanied by a witness fee. Tr. 215.

On November 23, the Hearing Officer issued a Report On Objections ("Report") finding Dispatcher Daniel Loewy was a supervisor under the Act, but recommending the Employer's Objections otherwise be overruled. The Hearing Officer found the evidence provided

[3] The Employer withdrew its Objection No.: 4.

did not support the conduct alleged in Objections 1 and 3. The Hearing Officer further found that the conduct alleged in Objection 2 did not affect employees' free choice in the election. Id.

E. The Employer's Exceptions To The Report And The Regional Director's Decision.

On December 8, the Employer filed twenty-nine Exceptions to the Hearing Officer's Report on Objections, as well as a Brief In Support of Employer's Exceptions (collectively the "Exceptions"), with Regional Director, Region 4, Dennis P. Walsh.

On January 17, 2017, the Regional Director issued the Decision, affirming the Hearing Officer's Report and overruling the Employer's Exceptions. The Regional Director further held that the Hearing Officer properly granted the Union's Petition to Revoke the Employer's subpoena *duces tecum*, which sought evidence regarding Loewy's status as an agent of the Union, and further denied the Employer's request to reopen the record to offer evidence that would have been produced in response to the subpoena. The Employer requests review of the Regional Director's Decision.

II. STATEMENT OF THE FACTS

A. About Euro Motorcars Devon.

Euro Motorcars Devon, Inc., operates a full-service Mercedes-Benz dealership in Devon, Pennsylvania. Tr. 13. In addition to its sales and leasing operations, the Employer also operates a service and repair shop with approximately twenty-eight (28) automotive technicians (hereinafter referred to as "technicians") who service Mercedes-Benz vehicles. Tr. 23; Dec. 2. In or about April 2015, New Country Motor Car Group ("New Country") purchased the Dealership. Tr. 13.

B. The Employer's Devon Facilities.

The Dealership is comprised of two separate buildings: (1) the Sales Building; and (2) the Service Building. The Sales Building sits at the base of a hill (abutting West Lancaster Avenue), and houses a showroom floor and administrative offices, which includes the Service Manager's Office. Tr. 14.

The technicians, Dispatcher, Foremen and Parts Department personnel work out of the Service Building that sits atop the hill in the back of the property. Id. The two buildings are separated by a winding driveway that is approximately 300 yards long. Id.

The Service Building is comprised of a Shop floor, administrative/office area, breakroom, and restroom. Er. Ex. 1. The Shop is "L"-shaped, with each technician having their own "service bay" to perform assigned service and repair duties. See Er. Ex. 1, p.1; Tr. 14, 17, 68. In addition to these service bays, the Service Building includes a Dispatch Office, the Parts Manager's Office, and a Parts Counter area where technicians go regularly throughout their workday to retrieve various parts for their assigned repairs. Er. Ex. 1; Tr. 20, 108.[4] These offices and the Parts Counter area are attached to the Shop floor through a doorway. Er. Ex. 1; Tr. 19. This doorway is the start of a corridor[5] between the Shop floor and a stairwell that leads to the second floor where the technicians' breakroom and restroom are located, and where the August 26 vote took place. See Er. Ex. 1; Tr. 19. The same corridor connects the Dispatch Office to the Parts Counter. Er. Ex. 1; Tr. 18. This corridor (also referred to as a "vestibule" during the hearing) can also be accessed through a door that leads to the exterior driveway (also referred to as a "walkway" during the hearing) between the Sales and Service Buildings. See Tr. 108.

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4 The Dispatch Office is labeled as "Shop Foreman" on Er. Ex. 1. See Tr. 17-18.

5 The corridor is labeled as "Tech Hall/Library" on Er. Ex. 1. See Tr. 18.

1. The Dispatch Office.

The Dispatch Office can only be entered through the aforementioned corridor. Er. Ex. 1. It is separated from the corridor by a single door with a glass window. See Tr. 34. The Dispatch Office is an open, "U"-shaped room with four computers located against the walls. See Tr. 32, 96. If one is standing in the doorway looking into the Dispatch Office, the Dispatcher's workstation and computer are in the corner to the immediate right. Tr. 96. There are two computers and workstations – one for each of the Shop's Foremen – in the corners against the far wall. Id. A computer used to print state inspection and emissions receipts and stickers is located in the corner of the office to the immediate left of the doorway. Id.

Technicians enter the Dispatch Office to: (1) receive work assignments from the Dispatcher; (2) print state inspection and emissions receipts and stickers; and/or (3) speak to the Foremen or Dispatcher who oversee operations in the shop. Tr. 105, 159.

2. High Traffic Areas In And Around The Service Department.

Technicians and other Dealership employees are constantly in the aforementioned corridor area during the course of their workday, which usually runs from approximately 8:00 a.m. to 5:00 p.m. Tr. 18, 108, 159. In addition to going to and from the Dispatch Office, technicians also regularly walk through the corridor to get to the Parts Counter area where they retrieve parts needed to complete their assigned repair jobs. Tr. 108. Technicians also must walk through the area if they want to go upstairs to the technician breakroom or restroom. Tr. 19. Technicians regularly travel through the corridor to access the door that leads directly to the driveway that connects the Sales Building. Tr. 27. Technicians often must go outside to the driveway area to retrieve cars waiting for service. See Tr. 22. They also walk along the driveway to the Sales

Building if they need to speak with the Service Manager, Assistant Service Manager, other management personnel, or a service advisor. Tr. 27.

In addition to technicians, other Dealership employees frequent the corridor/office area in the Service Building, as well as the driveway. Parts Department employees work at the Parts Counter located directly in the corridor. See Tr. 29, 151. If a member of management or a service advisor needs to speak with a technician, the Dispatcher, or a foreman, they will walk up the driveway and through the corridor to the Dispatch Office or shop floor. See Tr. 27.

C. Dispatcher Daniel Loewy Is The Technicians' First-Line Supervisor.

The Hearing Officer properly found, and neither party excepted to the ruling that, Daniel Loewy, as Dispatcher, is a supervisor under Section 2(11) of the Act because he uses independent judgment in determining which technician should be assigned to each repair order, and these assignments "directly impact[] the technicians[']' pay and terms and conditions of employment." Rep. 6. Although not referenced in the Report or Decision, Loewy's ability to directly control a technician's compensation also gives him the authority to either reward or discipline technicians on the Employer's behalf through his assignment of work. Tr. 26. Loewy can also independently modify the manner in which he assigns work in order to address employees' grievances. Tr. 63, 158. [6]

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[6] Specifically, if Loewy believes a technician is performing well or he feels it is appropriate to reward a technician, he can give that individual a "gravy job" that would optimize the technician's ability to earn extra pay. Tr. 26. On the other hand, if he feels a technician's work is substandard or otherwise wants to send a corrective message to a particular technician, he can punish them by assigning them less lucrative work. Id. Furthermore, if a technician expresses concern about the type of work he has been receiving, Loewy can address this issue by assigning the technician a separate "gravy job" or "packag[ing]" a gravy job with a less lucrative job in order to "ease the [financial] pain" of the more difficult job. Tr. 63, 158. Conversely, he can decide to take no action in response to the technician's complaint. Tr. 158.

D. The Petition And Pre-Election Period.

As was subsequently learned through another proceeding (in October 2016) involving Technician Matthew Mayberry, employees were motivated to reach out to the Union regarding representation primarily because the Dealership re-hired Service Manager Jeff Ridgway. Er. Ex. 2. According to Mayberry, he and another employee who had a similarly negative relationship with Ridgway led the unionizing effort. See Er. Ex. 2. The instant petition was filed thereafter.[7]

The August 26 election was frequently discussed by technicians during the weeks leading up to the vote. Tr. 176. Both the Employer and Petitioner provided information to eligible voters regarding their respective positions on the matter through meetings and written communications. Er. Ex. 3, 5, 7; Tr. 70, 71, 72, 82, 84. Furthermore, there was extensive discussion among the technicians and Dispatcher leading up to the election. Tr. 176. As a result, and as stated by Technician Luke Trumble, the mood in the shop during the pre-election period was emotional, unsettled, sad, and angry. Tr. 76.

1. Voting Employees Were Aware Of Union Representative Vincent Addeo's Violent And Aggressive Conduct.

The Employer provided written materials regarding the election process, collective bargaining, and the Union to all eligible voters. Tr. 82. These materials included a flyer referencing a Philadelphia Inquirer article on a "brawl" instigated by members of the International Association of Machinists. Er. Ex. 7; Tr. 84. Specifically, the flyer identified IAM representative Vincent Addeo, who also is the Union's lead organizer in the instant petition. Er. Ex. 7; Tr. 187. Attached to the flyer was a 2010 Memorandum Opinion from the United States District Court for

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[7] The Hearing Officer failed to recognize this relevant and material evidence in her Report, and the Regional Director improperly disregarded it in his Decision. RD Dec. 4.

the Eastern District of Pennsylvania. Id. The Court's Memorandum stated that Addeo (a named defendant therein) was among a group of IAM representatives charged with threatening members of a rival union before violently attacking them and causing physical injuries during an altercation at a hotel near the Philadelphia airport. Id.

The Union aggressively communicated with employees regarding the election and other matters during the critical period through meetings and written communications. Er. Exs. 3 & 5; Tr. 72, 196. For example, Addeo sent an email to all eligible voters on the eve of the election (August 25) in which he personally attacked New Country Executive Vice President Chris Mackey, calling him "a con-artist [sic] . . . a sad human being . . . a WEAK man and a COWARD . . . [and n]ot a good person in most people's eyes." Er. Ex. 3 (emphasis in original); Tr. 40, 196.

2. Loewy Actively And Aggressively Supported The Union During The Critical Period.

Loewy, who had an admittedly negative relationship with Ridgway, advocated for the Union throughout the critical period despite his status as a Section 2(11) supervisor. Rep. 6; Er. Exs. 6(a), 6(b); Tr. 77, 78-80, 162, 164. For example, he became visibly upset at the fact that Trumble engaged in an open conversation with the Employer's General Manager in the Dealership's parking lot, presumably because Loewy thought they were discussing the Employer's position regarding the election. Tr. 77. Also, on the eve of the vote, when Trumble spontaneously sent a text message to Loewy and a group of voters encouraging them to vote for the Employer in the election the next day, Loewy quickly and incredulously responded "Really!" to Trumble's message. Er. Exs. 6(a), 6(b).[8] Loewy also attended multiple Union meetings, spoke with Union

[8] The Hearing Officer refused to allow Employer's counsel to ask Loewy about the meaning of his text message. Tr. 169. The Regional Director improperly failed to consider the Hearing Officer's refusal in finding the Employer "has not so much as established that Loewy was supportive of the Petitioner, much less that he was advocating for it to the employees." RD Dec. 5. However, because Loewy is a Section 2(11) supervisor without any

representatives individually on the phone, and engaged in several other pro-Union conversations with technicians during the critical period. Tr. 170, 171, 175-76, 178.

E. The Day Of The Election.

1. Dispatcher Loewy Continued To Aggressively Seek Support For The Union From Individual Employees On The Morning Of The Vote.

Loewy also targeted and harassed individual voters to try to get them to vote for the Union on the morning of the election. Tr. 88. Specifically, Loewy "reared an ugly head" in an apparent and intimidating manner when he sought out Technician Aaron Stiller while he was working in his bay in the presence of other voters, and loudly accused him of being a "fence sitter" because he would not commit his support to the Union. Id.

2. Loewy Conducted A Captive Audience Meeting Immediately Prior To The Vote.

Between 10:00 a.m. and 10:30 a.m. on the day of the vote – approximately thirty (30) minutes before the polls opened – Loewy conducted a closed-door meeting with no less than four eligible voters (i.e., Technicians Taylor Clark, Brett Greenberg, James Downs, and Alex Knight) in the Dispatch Office. Tr. 34, 97. As defined by multiple witnesses at the hearing, the pre-vote gathering by Loewy had the direct appearance of a meeting. Tr. 31, 99. Specifically, instead of technicians milling about waiting for an assignment or working on one of the computers (the way technicians normally would when they are in the Dispatch Office), chairs were rearranged in a classroom setting facing the leader, Loewy. Tr. 33, 97, 98, 100, 102. Loewy, who had been an active Union supporter throughout the critical period, addressed the technicians by animatedly gesturing as they intently listened to him. Er. Exs. 6(a), 6(b); Tr. 31, 77, 98.

Section 7 rights, the Employer should have been afforded extensive leeway in asking Loewy about his interaction with and support of the Union.

As Dispatcher, Loewy is not responsible for conducting meetings such as the apparent one taking place minutes before the election or holding training sessions for technicians. Tr. 28, 119, 178. The Dispatcher and technicians did not have keys, repair orders, or any other work documents or materials in hand during the meeting. Tr. 35, 98. None of the meetings' attendants were working on the computers in the office (Tr. 97-98), and were startled to see Mackey walk by the Dispatch Office during the meeting. Tr. 33.

3. Addeo Directed A Threatening, Profanity-Laced Outburst Towards Mackey In The Presence Of Eligible Voters Shortly Before The Polls Opened.

On August 26, at or about 10:15 a.m., Mackey met Addeo and IAM Representative Chris Walsh in the driveway leading to the Service Building. Tr. 30, 40. Addeo immediately told Mackey that the election was "nothing personal" despite his scathing email to voters about Mackey less than twelve hours earlier. Er. Ex. 3; Tr. 40, 41, 47. Mackey quietly and calmly told Addeo he felt it was very personal based on Addeo's email. Tr. 47. Addeo continued to claim the election was nothing personal, but Mackey maintained that Addeo's email had made it so. Id. Mackey then said in a calm but firm tone that the three of them (i.e., Mackey, Addeo, and Walsh) should go to the voting room for the pre-election conference and then vacate the property. Tr. 47.

At that moment, it was like someone "had lit a stick of dynamite [under Addeo]," as he instantly became hostile and aggressive. Tr. 53. Addeo immediately turned and stormed up the driveway towards the Service Building ahead of Mackey and Walsh. Tr. 47. As he barreled up the driveway, Addeo repeatedly looked over his shoulder to shout "fuck you" and "fuck off" at Mackey and accused him of "starting all this." Tr. 47, 52. Dealership employees were walking past Addeo, Walsh and Mackey on the highly-travelled driveway as Addeo continued his outburst for the duration of the three-minute trek to the Service Building. Tr. 47, 48, 52, 206.

Addeo continued his tirade as he entered the office and parts desk area of the Service Building. Tr. 48. Inside the corridor, Addeo continued to speak in an inordinately loud manner within earshot of employees, including technicians who were in the hallway and at the parts desk. Tr. 51, 111. Addeo then positioned himself in Mackey's face, pointed at him, and called him, among other things, a "[m]otherfucker," "a piece of shit," and a "pink-shirted faggot." Tr. 48, 51, 53 (emphasis added). Mackey said nothing as Walsh attempted to calm Addeo down. Tr. 54, 111. After cursing at Mackey for several minutes in the driveway and corridor, Addeo was finally able to compose himself. Tr. 52.

Technician Jim Rapp was among the individuals who witnessed Addeo carrying on in the high-traffic corridor. Tr. 51, 109, 111. When Rapp, an eligible voter, went to retrieve parts from the Parts Counter, he heard Addeo shouting obscenities at Mackey. Tr. 111, 117. According to Rapp, Addeo's conduct made him very uncomfortable, to the point where he quickly retrieved the parts he needed and left the area as soon possible as Addeo continued his tirade. Tr. 111.

Details of the interaction spread like wildfire among the eligible voters. Tr. 149, 150, 152. According to former Technician Tim Koucheravy, who did not personally witness Addeo's tirade, "every single technician [including Koucheravy] knew of . . . the altercation" only a few minutes after the incident and before the polls opened. Tr. 152. Koucheravy testified the voting unit was discussing how Mackey had stated the matter was personal and how Addeo had called Mackey a "pink shirt faggot" within minutes of the outburst. Tr. 149, 150.

III. ARGUMENT

Contrary to the Regional Director's Decision, the credible evidence demonstrates Loewy and Addeo engaged in objectionable conduct that had a tendency to interfere with

employees' freedom of choice, thereby destroying the laboratory conditions necessary for a Board election.

As noted by the Regional Director, the proper test for determining whether to set aside an election due to the "conduct of a party is an objective one – whether [the conduct] has 'the tendency to interfere with the employees' freedom of choice.'" Taylor Wharton Division, 336 NLRB 157, 158 (2001) (quoting Cambridge Tool & Mfg., 316 NLRB 716 (1995)). As such, the subjective state of mind of the individual voters is irrelevant to the inquiry. Lake Mary Health & Rehabilitation, 345 NLRB 544, 545 (2005). In determining whether a party's misconduct has the tendency to interfere with employees' freedom of choice, the Board considers:

> (1) the number of incidents; (2) the severity of the incidents and whether they were likely to cause fear among the employees in the bargaining unit; (3) the number of employees in the bargaining unit subjected to the misconduct; (4) the proximity of the misconduct to the election; (5) the degree to which the misconduct persists in the minds of the bargaining unit employees; (6) the extent of dissemination of the misconduct among the bargaining unit employees; (7) the effect, if any, of misconduct by the opposing party to cancel out the effects of the original misconduct; (8) the closeness of the final vote; and (9) the degree to which the misconduct can be attributed to the party.

Taylor Wharton Division, 336 NLRB at 158; accord Cedars-Sinai Medical Center, 342 NLRB 596 (2004). When ruling on election objections, the Board considers the cumulative effect of the objectionable conduct and not merely whether an individual act would be sufficient to interfere with employees' free choice. See Metaldyne Corp., 339 NLRB 352, 352 (2003) (finding conduct to be objectionable under Cambridge Tool & Mfg. when "taken as a whole"). As set forth below, each of the Employer's three Objections provide a basis to vacate the election results, but when taken in their totality, there can be no question the election's laboratory conditions were compromised.

Here, the Regional Director's findings and rulings regarding the objectionable nature of Addeo's and Loewy's conduct, as well as Loewy's status as an agent of the Union, are clearly erroneous based on the weight of the credible evidence. Furthermore, his analysis and rulings, including those regarding the enforceability of the Employer's subpoena duces tecum, are contrary to prevailing Board law. As such, and for the reasons described further below, the Employer respectfully requests that the Board sustain the Employer's exceptions, set aside the results of the August 26 election, and order a new election.

A. The Regional Director's Analysis Of Addeo's Conduct Raises A Substantial Question Of Law Based On A Departure From Officially Reported Board Precedent.

The Employer objected to Addeo's outrageous conduct on the day of the vote, which included, but was not limited to, shouting homophobic slurs and obscenities at Mackey in a menacing manner in the presence of eligible voters in close proximity to the voting time and location. Bd. Ex. 1. Instead of analyzing the entirety of Addeo's conduct as required by Board law, the Regional Director erred by considering only a single comment by Addeo. RD Dec. 10. If the correct standard is applied to the credible record, it is clear that Addeo engaged in objectionable conduct that requires the results of the election be set aside.

1. The Regional Director Failed To Apply The Proper Standard When Analyzing Addeo's Conduct.

In his analysis, the Regional focused solely on the "pink shirted faggot" comment. RD Dec. 10. As such, he looked exclusively at that statement to determine whether it, standing alone, was sufficiently discriminatory or prejudicial to set aside the election under Sewell Manufacturing Co., 138 NLRB 66, 70 (1962) and its progeny. Id. However, the Regional Director's analysis fails to consider the full scope of Addeo's actions, the relevant Objection, and reported Board precedent.

The Employer's Objection to Addeo's conduct was not based on a single comment. Instead, the Employer objected to the totality of Addeo's actions on the morning of August 26. As such, the Regional Director was required under Board law to analyze Addeo's entire outburst under the factors set forth in Taylor Wharton Division, 336 NLRB 157. See Metaldyne Corp., 339 NLRB at 352. As described further below, Addeo's conduct was objectionable under Board law, so the RD Decision must be overturned.

2. Addeo's Violent Outburst Interfered With Employees' Free Choice In Violation Of The Act.

When applying the factors set forth in Taylor Wharton, as required by Board law, it is clear that Addeo's outburst would tend to interfere with the employees' freedom of choice in the election.

Addeo's outrageous conduct was undoubtedly severe and likely to cause fear among eligible voters based on his August 26 actions only minutes before polls opened and Addeo's well known prior violent history. Addeo's extended tirade began outside on the heavily traversed driveway leading to the Service Building, and continued into the high-traffic corridor of the Service Building. Tr. 52. During his tantrum, Addeo repeatedly shouted "fuck you" and "fuck off" at Mackey, and called him a "[m]otherfucker," "piece of shit" and a "pink-shirted faggot" loud enough for everyone in these areas to hear. Tr. 48, 51, 53.[9] Not only was Addeo verbally

[9] The Regional Director found the severity of Addeo's outburst to be limited because Rapp did not hear him call Mackey a "pink shirted faggot." Dec. 10. However, as Mackey credibly testified, Addeo's outburst lasted for several minutes both inside and outside of the Service Building. Tr. 52. Rapp, on the other hand, was only in the hallway long enough to retrieve the parts he needed from the Parts Counter. Tr. 107, 111. During Rapp's brief time in the area, he heard Addeo "yelling" and "cursing" at Mackey, but promptly left because he is not comfortable with "arguments [and] violence." Tr. 111. Therefore, the fact that Rapp did not hear a particular comment during his brief time in the area does not negate the severity of Addeo's prolonged and threatening outburst, nor does it suggest that no employee was present at the time. Furthermore, Koucheravy's testimony regarding the immediate dissemination of the details of Addeo's conduct also demonstrates that other employees were in the area at the time. Tr. 149, 150, 152, 190.

abusive, but physically menacing, as well, as he positioned himself in Mackey's face and pointed at him while in the corridor of the Service Building. Tr. 53.

Addeo's outburst was extremely likely to cause fear among the eligible voters, who were pensive at best during this time and well aware of Addeo's violent tendencies. Er. Ex 7; Tr. 76, 84. The mood in the shop was "unsettled" and all eligible voters received the Employer's pre-election communications describing Addeo's alleged participation in a "brawl" that resulted in injuries to the victims and a federal lawsuit. Er. Ex. 7; Tr. 76, 84.[10] Indeed, Rapp testified that he quickly left the area because Addeo's behavior made him uncomfortable. Tr. 111. Objectively, Addeo's outburst was likely to cause fear among eligible voters.

Addeo's outburst took place in close temporal and physical proximity to the election. The corridor was directly down a single flight of stairs from the voting location. Er. Ex. 1; Tr. 19. Furthermore, Addeo's outburst began within an hour before the vote, and lasted until shortly before the polls opened. Tr. 30, 52. In fact, Addeo was in the Service Building for the purpose of participating in the NLRB pre-election. Tr. 187. Clearly this aggressive conduct by Addeo remained at the forefront of voters' minds up until the point they voted since the election began shortly after the altercation ended.

As Koucheravy testified, details of the incident were disseminated almost immediately among eligible voters, to the point that "every single technician knew of . . . the

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[10] The Regional Director's refusal to consider the information the Employer distributed regarding Addeo's violent past on the grounds "it is irrelevant to this proceeding, and would result in an unfair prejudice to the Petitioner" was improper. RD Dec. 11. The Employer did not submit this evidence for the purpose of establishing that Addeo actually engaged in the alleged outrageous conduct on the day of the vote. Instead, this evidence was presented for the purpose of establishing the frame of mind of the "objective" voter during the critical period, and the effect Addeo's conduct would have on the voting unit – critical pieces of the Taylor-Wharton analysis. In addition, the manner in which information related to objectionable conduct is disseminated is irrelevant, and so the fact that the information came from the Employer should have had no effect on the Regional Director's analysis. See S.T.A.R., Inc., 347 NLRB 852, 854 (2006) ("[The Board will] not preclude the Employer from relying on its own dissemination of [information] to show the Petitioner's conduct affected [the voting unit.]"). As such, the Regional Director's refusal to consider this key fact represents a departure from established Board precedent.

altercation," including specific details thereof, before the vote. Tr. 152.[11] Because the entire bargaining unit was aware of this altercation in such close proximity to the start of the polling period, Addeo's actions easily could have swung the results of the election in the Union's favor.[12] Moreover, the Employer did not engage in any misconduct that would cancel out or justify Addeo's actions.[13]

Based on established Board law, which the Regional Director failed to consider, Addeo's outburst on the day of the election in the presence of eligible voters tended to interfere with employees' free choice, and so the RD Decision must be overturned, the election must be set aside, and a new election must be ordered.

B. The Regional Director's Finding And Analysis Regarding Loewy's Conduct, Both As A Supervisor And A Union Agent, Were Erroneous.

As described further below, Loewy engaged in objectionable conduct in his capacity as a Union agent and as a pro-Union Section 2(11) supervisor.

1. The Regional Director's Finding That Loewy Was Not An Agent Of The Union Was A Departure From Board Precedent.

The Regional Director erroneously determined there was insufficient evidence on the record to find that Loewy was an agent of the Union. RD Dec. 5. However, the credible record evidence more than demonstrates Loewy's agency status under applicable Board law.

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[11] The Regional Director apparently disregarded Koucheravy's testimony about the immediate dissemination of Addeo's outrageous conduct because he was unable to testify as to how employees became aware of the incident. RD Dec. 10. However, under established Board law, the manner of dissemination is irrelevant. S.T.A.R., Inc., 347 NLRB at 854. As such, Koucheravy's inability to describe how the bargaining unit became aware of Addeo's outrageous behavior is irrelevant, and should not have been considered by the Regional Director.

[12] There is no question that Addeo's conduct must be attributed to the Union. He is a business representative and the lead organizer for the Union. Tr. 187.

[13] The Regional Director's suggestion that Addeo's extended tirade – during which he was physically menacing, cursed multiple times, and used a homophobic slur towards Mackey – was somehow justified by Mackey's single comment about getting off the property is absurd, especially considering the tone and manner ("calm, cool, and collect[ed]") in which it was delivered and the fact it was not heard by anyone except for Addeo and Walsh. Tr. 48. Furthermore, the fact that Addeo may have been late to the pre-election meeting is also irrelevant because the bulk of his tirade occurred well before the scheduled meeting time.

The Board applies common law principles when considering whether an individual is an agent of the union." Bellagio, LLC, 359 NLRB 1116, 1117 (2013). Under these principles, agency can be established through the actual or apparent authority granted by the principle to the agent. Id. "Apparent authority results from a manifestation by the principal to a third party that creates a reasonable basis for the latter to believe that the principal has authorized the alleged **agent** to perform the acts in question." Id. at 1117 (quoting Great American Products, 312 NLRB 962, 963 (1993)). "[E]ither the principal must intend to cause the third person to believe that the agent is authorized to act for him, **or the principal should realize that this conduct is likely to create such belief.**" Service Employees Local 87 (West Bay Maintenance), 291 NLRB 82, 83 (1988) (emphasis added) (citation omitted). The Board will consider the totality of the circumstances when determining agency status. Bellagio, 359 NLRB 1117. Furthermore, Section 2(13) of the Act dictates that "the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling."

The Regional Director failed to consider relevant evidence demonstrating Loewy was vested with the apparent authority to act as the Union's agent. The record shows that employees were motivated to unionize primarily because the Dealership re-hired Jeff Ridgway as Service Manager in the summer of 2016. Er. Ex. 2. Furthermore, Loewy had an admittedly poor relationship with Ridgway, attended Union meetings, and engaged in personal phone calls with Union representatives. Tr. 162, 164, 171, 175-76, 177. Loewy also avidly and aggressively supported the Union up to and including the day of the vote. Er. Ex. 6(a), 6(b); Tr. 88. Based on Loewy's close ties to and adamant support of the Union during the critical period, the Union should have been aware that eligible voters would perceive Loewy to be a "leader" of the employee organizing. Er. Ex. 2. Service Employees Local 87 (West Bay Maintenance), 291 NLRB at 83.

As such, under Board law, Loewy was vested with the apparent authority to act as an agent of the Union.

2. The Regional Director Erred By Determining Loewy Did Not Conduct A Pro-Union Captive Audience Meeting In Violation Of Board Law.

The Regional Director's finding that there was no evidence to establish Loewy delivered a campaign speech to a massed assembly of employees in the 24-hour period preceding the election was clearly erroneous in light of the record. Rep. 10. Furthermore, the Regional Director departed from Board precedent by misstating and misapplying the rules established under Peerless Plywood, 107 NLRB 427 (1954) and its progeny, and by failing to analyze Loewy's conduct under Harborside Healthcare., 343 NLRB 906 (2004).

a. The Regional Director's Determination That Loewy Did Not Conduct A Pro-Union Meeting On The Morning Of the Election Was Clearly Erroneous.

Less than an hour before the polls opened on August 26, both Mackey and Adams witnessed Supervisor Loewy, an active supporter of the Union throughout the critical period with no responsibility for conducting meetings or trainings, holding what could only be described as a closed-door meeting in the Dispatch Office with no less than four eligible voters. Tr. 28, 31, 99, 119, 178. The technicians had lined up chairs in a classroom-like, semi-circle formation facing Loewy, who in turn was seen with his back to the door as he gestured and spoke to his captivated audience. Tr. 33, 97, 98, 100, 102. None of the individuals in the Dispatch Office were using any of the computers, and none were holding keys or documents that would accompany a work-related discussion between the Dispatcher and technicians. As such, the entire scenario was completely inconsistent with the way technicians usually mill about or perform work when they are in the Dispatch Office, as well as how Loewy would normally conduct his own job duties. Tr. 98.

Despite Mackey and Adams' inability to hear the conversation taking place in the Dispatch Office the morning of the vote, Loewy's avid support of the Union throughout the critical period, the fact that Loewy discussed the vote with employees on the day of the vote, and because he is not responsible for conducting meetings or trainings, there is only one logical conclusion: Loewy was promoting the Union to a group of eligible voters regarding the election in the Dispatch Office on August 26.

Based on the above, the Regional Director's conclusion that there was insufficient evidence to determine Loewy was conducting a pro-Union captive audience meeting on the morning of the vote was clearly erroneous. See NLRB v. Mini-Togs, Inc., 980 F.2d 1027, 1032 (5th Cir. 1993) (upholding Board's findings of fact that were based on circumstantial, rather than direct evidence).[14]

b. The Regional Director Failed To Apply The Standards Established Under Peerless Plywood *And Its Progeny.*

Despite the Regional Director's conclusions, Loewy violated Peerless Plywood Co., 107 NLRB 427 (1954) and its progeny by conducting a captive audience meeting in his capacity as Union agent. The Board has long held that discussions with "massed assemblies" of two or more employees during the twenty-four-hour period prior to the vote warrant setting aside an election because the "timing [of such discussions] tends to create a mass psychology which overrides arguments made through other campaign media and gives an unfair advantage to the

[14] The Regional Director erroneously viewed the employer's failure to call Downs, Greenberg, and King to testify regarding Loewy's captive audience meeting as a factor in determining whether the Employer established the pro-Union nature of the meeting. It is well-established that a negative presumption against a party who does not call a potentially adverse witness is not appropriate. Continental Auto Parts, 357 NLRB 840, 842 n. 12 (2011); International Automated Machinists, 285 NLRB 1122, 1123 (1987). Here, the Employer did not call Downs, Greenberg, or King because of the likelihood that they would be unreliable witnesses (as evident with Clark). Furthermore, they would not be called to corroborate the testimony of Adams and Mackey, but would have to be called to provide completely new evidence regarding what was actually said in the meeting.[14] As such, the Employer's failing to call potentially adverse witnesses to provide new evidence should not be considered in this matter.

party, whether employer or union, who in this manner obtains the last most telling word." 2 Sisters Food Group, 357 NLRB 1816, 1822 n. 23 (2011) (quoting Peerless Plywood Co., 107 NLRB at 429). The Board has held that the coercive effect of such discussions is so "**absolute**" that they warrant setting aside an election in all cases, even if the number of massed voters would be insufficient to affect the final results of the vote. Honeywell, Inc., 162 NLRB 323, 325 (1967) (emphasis added); see Great Atlantic & Pacific Tea Co., 111 NLRB 623, 625-26 (1955) (overturning an election based on a supervisor holding group meetings with less than 2% of 6,500 eligible voters within 24 hours of the vote).[15] The Board has also held that a party violates Peerless Plywood if it expresses its position on the election during a meeting that was not originally called for that purpose. See Mallory Capacitator Co., 167 NLRB 647 (1967).

As described above, the credible evidence demonstrates Loewy, an IAM agent, conducted a pro-Union closed door meeting with four technicians during working time on the morning of the vote. In doing so, Loewy violated the rules established under Peerless Plywood and its progeny, and so the August 26 election must be set aside and a new election must be ordered.

c. *The Regional Director Erred By Failing To Analyze Loewy's Captive Audience Meeting Under* Harborside Healthcare.

It is well-established that pro-union supervisory conduct must be analyzed under the standard established under Harborside Healthcare. However, despite recognizing Loewy's

[15] The Regional Director's focus on the percentage of voting employees attending a captive audience meeting is clearly inconsistent with well-established Board law. Great Atlantic & Pacific Tea Co., 111 NLRB at 625-26 (1955).

status as a Section 2(11) supervisor, the Regional Director departed from Board law by failing to analyze Loewy's captive audience meeting under this standard.

Under Harborside Healthcare, the Board utilizes the following two-prong test in order to determine whether pro-union activity by a supervisor constitutes objectionable conduct for which the Union will be held responsible:

> (1) Whether the supervisor's prounion conduct reasonably tended to coerce or interfere with the employees' exercise of free choice in the election. This inquiry includes: (a) consideration of the nature and degree of supervisory authority possessed by those who engage in the prounion conduct; and (b) an examination of the nature, extent, and context of the conduct in question[; and]
>
> (2) Whether the conduct interfered with freedom of choice to the extent that it materially affected the outcome of the election, based on factors such as: (a) the margin of victory in the election; (b) whether the conduct at issue was widespread or isolated; (c) the timing of the conduct; (d) the extent to which the conduct became known; and (e) the lingering effect of the conduct.
>
> Id. at 909.

The Board has noted that first-line supervisors with the authority to assign and direct work and discipline employees have a "broad impact on employees' daily work lives." Madison Square Garden, CT, LLC, 350 NLRB 117, 121 (2007) (citing SNE Enterprises, Inc., 348 NLRB 1041, 1043 (2006) ("[T]he first-line supervisor has the most day-to-day contact with the employees [and] his or her authority to assign and responsibly direct can impact broadly on subordinates' daily work lives.")). In examining objectionable conduct under Harborside Healthcare, the Board does not consider just one act by the supervisor, but instead examines the totality of the individual's pro-Union conduct. See Madison Square Garden, 350 NLRB at 121 (considering "all the facts and circumstances present," including supervisors' pro-union statements, opposition to anti-union propaganda, and passive attendance at union meetings in

finding a violation of Harborside Healthcare). When one applies this standard to Loewy's closed door meeting, as required by Board law, it is clear that the August 26 election must be set aside.

With regard to the first prong of the Harborside Healthcare analysis, Loewy conducting a pro-Union captive audience meeting was undeniably coercive. See Honeywell, Inc., 162 NLRB at 325; Great Atlantic & Pacific Tea Co., 111 NLRB at 625-26. As first-line supervisor, Loewy has significant authority over the technicians. See SNE Enterprises, 348 NLRB at 1043.[16] In addition, Loewy was a vocal and active supporter of the Union throughout the critical period, up to and including the day of the vote. Er. Exs. 6(a), 6(b); Tr. 77, 78-80, 88, 162, 164, 170, 172.

With regards to the second prong of the Harborside Healthcare test, Loewy's interference with the technicians' free choice materially affected the outcome of the election.[17] Loewy held the meeting in the Dispatch Office where the technicians visit multiple times per day to receive their job assignments. Furthermore, Loewy conducted his meeting shortly before the polls opened so as to have maximum impact on the attendees as they cast their votes.

For these reasons, Loewy engaged in objectionable pro-Union supervisory conduct in violation of Board law, and, therefore, the August 26 election should be set aside, and a new election should be ordered.

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[16] The Regional Director's erroneous references to Loewy's "limited authority" stand in stark contrast to well-established Board law regarding the significant authority first-line supervisors have over employees. RD Dec. 6.

[17] As described above, violations of Peerless Plywood mandate that elections be overturned even if less than a determinative number of voters attended the meeting. Honeywell, Inc., 162 NLRB at 325; Great Atlantic & Pacific Tea Co., 111 NLRB at 625-26. Despite the Regional Director's suggestions otherwise, the fact that only four eligible voters attended Loewy's improper meeting and the election was decided by ten votes is irrelevant to whether Loewy violated Harborside Healthcare.

3. The Regional Director Erred In Finding Loewy Did Not Engage In Objectionable Conduct By Aggressively Approaching Schiller And Calling Him A "Fence-Sitter" In The Presence Of Eligible Voters.

The Regional Director's conclusion that there was insufficient evidence to find that Loewy approached Schiller in his bay on the morning of the vote and, in the presence of other eligible voters, loudly called him out as a "fence-sitter" for failing to pledge his support for the Union was clearly erroneous. RD Dec. 8. Furthermore, his failure to examine Loewy's conduct under Harborside Healthcare was a departure from established Board precedent. As such, the RD Decision must be overturned.

a. The Credible Evidence Establishes Loewy Targeted Schiller For His Failure To Pledge Support To The Union In The Presence Of Eligible Voters.

Technician Trumble credibly testified at the hearing that Technician Steve Tronieri had informed him that Supervisor Loewy "reared an ugly head" in intimidating manner when he loudly accused Schiller of being a "fence-sitter" in the presence of other employees. Tr. 88. Tronieri, who informed Trumble of the comments shortly after they occurred, was medically unable to participate in the hearing. Tr. 88. However, Trumble credibly testified to his conversation with Tronieri, and Loewy never denied engaging in the allaged conduct. Tr. 88, 90, 171. As such, the weight of the credible evidence demonstrates that Loewy indeed called Schiller a "fence-sitter" on the morning of the vote. See Waterbed World, 301 NLRB 589, 593 (1990) (noting admission of hearsay evidence appropriate when witness is too ill to testify).

b. The Regional Director's Analysis Under Harborside Healthcare *Was Erroneous And Incomplete.*

The Regional Director stated that even if he did find that Loewy targeted Schiller as described above, he would still overrule the objection because Loewy, as a Section 2(11)

supervisor, did not engage in objectionable conduct under Harborside Healthcare, Inc. However, the Regional Director failed to properly apply Board precedent in abbreviated analysis.

For one, the Regional Director's analysis was erroneous because he failed to recognize the significant nature and degree of supervisory authority Loewy holds over the technicians. The Regional Director referred to Loewy's authority as "limited," but Board law states that, as first-line supervisor, Loewy has a more significant influence on voting employees than actions taken by other supervisors with less control over the technicians' day-to-day conditions of employment. SNE Enterprises, 348 NLRB at 1044. Second, the Regional Director considered Loewy's actions towards Schiller in isolation in determining Loewy did not engage in objectionable conduct, as opposed to considering the totality of his pro-Union activities as required under Board law. See Harborside Healthcare 343 NLRB 906; Metaldyne Corp., 339 NLRB at 352.

Finally, the Regional Director's statement that Loewy calling Schiller a "fence-sitter" would not violate Harborside Healthcare because it was unaccompanied by any threat of reprisal is clearly inconsistent with Board precedent. RD Dec. 6. It is well-established that "when a supervisor engages in pro-union activity, . . . the 'continuing relationship' between the supervisor and an employee creates a possibility that an employee could be 'coerce[d] into supporting the union out of fear of future retaliation by a union-oriented supervisor' . . . regardless of whether the supervisor overtly indicated that he would use his supervisory authority to punish employees who did not support the union or reward those who did." Madison Square Garden, 350 NLRB at 119 (quoting Sheraton Motor Inn, 194 NLRB 733, 734 (1971)). As such, "in order to set aside an election on the basis of pro-union supervisory conduct, it is not necessary to find that a supervisor made explicit threats or promises." Madison Square Garden, 350 NLRB at 120 (citing Harborside

Healthcare, 343 NLRB 906). Therefore, the fact that Loewy did not explicitly threaten Schiller is irrelevant to determining whether the statement would have a coercive effect.

For these reasons, the Regional Director's analysis regarding Loewy's statements to Schiller was inconsistent with Board precedent, and so the RD Decision must be overturned.

C. The Employer's Case Was Prejudiced By The Improper Revocation Of Its Subpoena Duces Tecum.

The Regional Director erroneously sustained the Hearing Officer's initial ruling to grant the Union's Petition to Revoke the Employer's subpoenas *duces tecum*, thereby prejudicing the Employer in its ability to access and submit relevant and necessary evidence regarding Loewy's status as an agent of the Union.

Prior to the hearing, the Employer timely served valid subpoenas on the IAM's offices in Brooklyn, New York, and Cincinnati, Ohio. The subpoenas demanded documents and information regarding the Union's communications with and directives to Loewy that would assist in establishing Loewy's status as an agent of the Union. At the hearing, the Union hand-delivered a Petition to Revoke the subpoenas, and the Hearing Officer – without citing any Board authority – improperly sustained the Union's Petition to Revoke because the subpoenas were not accompanied by a witness fee, Tr. 215, despite the subpoenas calling only for the copying and production of documents. In addition, the Employer's cover letters clearly stated that it would provide the appropriate production fees upon the Union's request. In light of Loewy's biased and evasive testimony, the documents responsive to the subpoena were crucial to the Employer's ability to establish Loewy as an agent of the Union. As such, and as noted in its Exceptions, the Employer was unable to offer evidence regarding a pivotal issue due to this incorrect ruling. See CPS Chemical, Co., 324 NLRB 1018 (1997). The employer was unable to adequately respond to

the Union's "eleventh hour" petition or modify its case based on the lack of documents, and so its only recourse was to request a retrial on the pertinent issue following access to these records.

The Regional Director sustained the quashing of the subpoena, but on the grounds that the requested information was irrelevant and moot. However, the Regional Director's reasoning ignores the record evidence and is, at best, misplaced. For one, he states that – in spite of Trumble's testimony regarding the Loewy's text messages and the hostility with which Loewy reacted when Trumble was speaking to the General Manager – there is no record evidence of Loewy's support of the Union beyond the "fence-sitter" comment. He similarly disregards Loewy's own statements regarding his attendance at Union meetings and conversations with Union officials. As such, the Regional Director's initial premise that there is no evidence that Loewy supported the Union is clearly erroneous.

The Regional Director suggests that reopening the record for this limited purpose would be burdensome and inappropriate. However, because the Union served its Petition at the hearing, and the Hearing Officer closed the record immediately after her making ruling, the Employer's only recourse in the face of the Hearing Officer's ruling – which was not supported by any Board law on the issue – is to seek the opportunity to reopen the record for this limited purpose.

The Regional Director goes on to state that the Employer's subpoena was little more than a fishing expedition, but his reasons in support of this statement are completely illogical. To wit, the Regional Director seems to find that there would be no evidence of Loewy's agency status in the subpoenaed records because such evidence would have been discovered during the Employer's discussions with Loewy and employees. However, if all evidence could be discovered

through interviews and testimony, there would be no reason for the Board to utilize documentary subpoenas: all of the evidence would be available through other forms.

Because the Regional Director erroneously sustained the Hearing Officer's decision to grant the Union's Petition to Revoke, the Employer renews its request for a retrial on the pertinent issue of Loewy's agency status following access to the subpoenaed records

D. The Regional Director Erred In Failing To Consider The Totality Of The Objectionable Conduct.

For the reasons explained above, each of the Employer's Objections, standing on its own, provides sufficient grounds for setting aside the results of the August 26 election. Taken together, the cumulative effects of Addeo's and Loewy's conduct during the critical period and the day of the vote undoubtedly had a tendency to interfere with employees' freedom of choice in the election.

Board law requires that the aggregate effect of all objectionable conduct be considered in determining whether the laboratory conditions necessary for a free election were compromised. Metaldyne Corp., 339 NLRB at 352. Here, prior to the election, the entire voting unit was subjected to and/or aware of: (1) Addeo's outrageous and profane tirade directed at Mackey on the morning of the vote; (2) consistent support of the Union by their supervisor and Union agent, Loewy, during the critical period; (3) Loewy's captive audience meeting in support of the Union on the morning of the vote; and (4) Loewy calling Schiller a "fence-sitter" for failing to pledge his support to the Union shortly before the polls opened. As described above, each one of these violated established Board law and destroyed the laboratory conditions necessary for a free election. Taken together, Addeo's and Loewy's conduct certainly had the tendency to interfere with employees' freedom of choice. Therefore, the election should be set aside and a new election should be ordered.

IV. CONCLUSION

For the reasons stated above, in the Regional Director's Decision On Objections To Election And Certification of Representative, there is a substantial question of law or because of the absence of, or departure from, officially reported Board precedent. Furthermore, the Regional Director's rulings regarding substantial factual issues are clearly erroneous on the record, and such errors prejudicially affected the rights of the Employer. As such, the Employer respectfully requests that the Board review and overturn the Decision, set aside the August 26 election, and order a new election.

Respectfully submitted,

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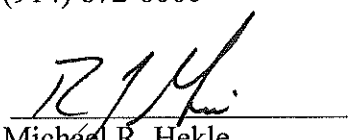
By: 
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Robert J. Guidotti

Dated: January 31, 2017
White Plains, New York

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION FOUR

EURO MOTORCARS DEVON, INC.,
Employer **Case No. 04-RC-181300**

and

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, DISTRICT LODGE 15, LOCAL LODGE 447,
Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on January 31, 2017 copies of the foregoing Brief In Support Of Employer's Exceptions To The Hearing Officer's Report On Objections were electronically filed with the National Labor Relations Board and served via e-mail upon:

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